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In The

# Supreme Court of the United States

JOSE MONTEMAYOR, COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE; JOHN CORNYN, ATTORNEY GENERAL OF TEXAS,

*Petitioners,*

v.

CORPORATE HEALTH INSURANCE, INC.; AETNA HEALTH PLANS OF NORTH TEXAS, INC.; AETNA LIFE INSURANCE COMPANY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Insurance Commissioners (NAIC) respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as an amicus curiae in this case in support of the Petition for a Writ of Certiorari, and in support of its motion states:

1. Counsel of record for NAIC attempted to obtain the consent of all parties to the filing of an amicus curiae brief by NAIC by contacting the parties' counsel of record.

2. The Petitioners, Jose Montemayor, Commissioner of the Texas Department of Insurance, and John Cornyn, Attorney General of Texas, have consented to the filing of an amicus curiae brief by NAIC through their counsel of record, David C. Mattax, of the Office of the Attorney General of Texas.

3. None of the Respondents have replied to NAIC's request for their consent.

4. NAIC has a strong interest in this case as set out fully in the brief submitted with this motion.

WHEREFORE, premises considered, the National Association of Insurance Commissioners respectfully moves this Court for leave to file a brief as amicus curiae.

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## INTEREST OF AMICUS CURIAE[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation comprised of the chief insurance regulators in each state, four territories and the District of Columbia. The NAIC assists these officials in the pursuit of fundamental insurance regulatory objectives, including: (1) maintaining and improving state regulation in a responsive and efficient manner; (2) maintaining the reliability of insurance business with respect to financial solidity and guarantees against loss; and (3) ensuring fair, just and equitable treatment of policyholders and claimants.[2]

The issues before this Court implicate the NAIC's objectives because they address whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1999), preempts state laws that regulate insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A).

The NAIC adopted the Health Carrier External Review Model Act (Model Act), Model No. 75, *I NAIC Model Laws, Regulations and Guidelines* (2000), on October 4, 1999. Generally, the Model Act provides for independent review of health carrier coverage decisions based on medical judgment. By adopting this Model Act, the NAIC declared that the independent review of certain claims determinations furthers the NAIC mission – to ensure the fair, equitable and just treatment of insurance consumers.[3] The Fifth Circuit's decision in *Corporate Health*

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than this Amicus Curiae, made a monetary contribution to the preparation and submission of this brief.

[2] NAIC Constitution, Article II. Mission Statement, *I NAIC Proceedings*, 1997, at iv.

[3] *Id.*

*Ins. v. Texas Dep't of Ins.*, 215 F.3d 526 (5th Cir. 2000), obstructs insurance regulators' ability to protect insurance consumers.

## SUMMARY OF ARGUMENT

This Court should grant the Petition for a Writ of Certiorari in *Jose Montemayor, Comm'r of the Texas Dep't of Ins.; John Cornyn, Attorney Gen. of Texas v. Corporate Health Ins. Inc.*, No. 00-665. There is a clear conflict in the circuit courts because of differing interpretations of this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

The Fifth Circuit holding in *Corporate Health* cannot be reconciled with the Seventh Circuit holding in *Moran v. Rush Prudential HMO, Inc.*, No. 99-2574, 2000 U.S. App. LEXIS 26053 (7th Cir. Oct. 19, 2000). There is also a conflict between the Fifth Circuit in *Corporate Health* and the Second Circuit in *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995). State independent review laws are of great public importance because they ensure that consumers get the benefits to which they are entitled. The Fifth Circuit decision threatens to invalidate this critical consumer protection enacted in a majority of states.

This Court should hold that Texas's independent review law is not preempted by ERISA, because it does not create an alternative enforcement mechanism. *Moran*, 2000 U.S. App. LEXIS 26053 at *31. Texas's law adds terms to insurance contracts, which are enforceable through suits under ERISA. *See, UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 375-376 (1999). This Court should also hold that § 514's insurance saving clause, by its plain language, limits the preemptive effect of § 502.

## ARGUMENT

### A. There is a Conflict in the Circuit Courts Regarding Whether State Independent Review Laws Create Alternative Enforcement Mechanisms to § 502; and Whether Such Laws, if Held to Provide a Remedy Supplemental to § 502, are Nevertheless Saved From Preemption as Laws Regulating Insurance.

This case presents two conflicts that arise out of disparate readings of *Pilot Life v. Dedeaux*, 481 U.S. 41.[4] *Pilot Life* involved a claim for disability benefits. The respondent, Everate W. Dedeaux, filed various common law tort and contract actions seeking damages for Pilot Life's denial of his disability benefit claims. All Mr. Dedeaux's common law causes of action were held to "relate to" an ERISA plan. This Court, however, reviewed whether Mississippi's common law cause of action for insurer bad faith in the handling of Mr. Dedeaux's disability claim would otherwise be "saved" as a law regulating insurance under ERISA § 514(b)(2)(A). This Court found that it was not such a law. Mississippi's law of bad faith was derived from general tort and contract law principles and as such, was not specifically directed at the insurance industry. Therefore, the law did not "regulate insurance" from a common-sense perspective. *Id.* at 50.[5]

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[4] While we agree that the other issues addressed by Petitioners have merit, we have focused on issues that apply uniquely to laws regulating insurance.

[5] The law met one of a possible three McCarran-Ferguson factors: (1) the common law tort of bad faith did not effect a spreading of the risk; (2) the law's connection to the insurer-insured relationship was attenuated at best; and (3) the law was not limited to entities within the insurance industry. 481 U.S. at 50-51.

While unnecessary to the holding that ERISA preempts Mississippi's common law of insurer bad faith, this Court also considered the role of the civil enforcement provisions provided in ERISA § 502. *Id.* at 51-57. This Court stated that ERISA's civil enforcement scheme, including the remedies it provided, was intended to be exclusive, further supporting its conclusion that the bad faith claim was preempted.[6] *Id.* at 52. In support of this declaration, this Court cited the language and structure of § 502, as well as legislative history stating that § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 141 *et seq.* (1999) was the model for § 502. *Id.*

**1. The Fifth Circuit decision in *Corporate Health* and the Seventh Circuit decision in *Moran* conflict as to whether state independent review laws provide an alternative enforcement mechanism to ERISA § 502.**

The Courts of Appeals for the Fifth Circuit and the Seventh Circuit reached opposite conclusions regarding whether ERISA preempts state independent review laws. On October 19, 2000, the Seventh Circuit decided *Moran*, which involved Illinois's independent review law. 215 Ill. Comp. Stat. 125/4-10 (West Supp. 2000). Contrary to the Fifth Circuit decision in *Corporate Health*, the Seventh Circuit held that Illinois's independent review law was not preempted under ERISA.

According to the Seventh Circuit, the independent review law regulated insurance within the meaning of the saving clause, and did not provide an alternative enforcement mechanism in conflict with ERISA § 502. 2000 U.S. App. LEXIS 26053 at *25, *31. The independent review

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[6] We are not conceding the meaning or impact of this statement at this time. *See infra part C.*

law merely added to the insurance contract a supplemental "internal" procedure used to make a medical necessity decision in the event that the HMO and a patient's primary care physician disagree. *Id.* at *32. The Seventh Circuit observed that the determination of the reviewing physician would be enforced under § 502(a)(1)(B), and therefore the independent review law alters the plan itself, rather than the mechanism to enforce the plan. *Id.*

The Fifth Circuit in *Corporate Health* reached the opposite conclusion with respect to Texas's independent review law. The Fifth Circuit, citing *Pilot Life*, emphasized that § 502 preempts not only directly conflicting remedial schemes, but also supplemental state law remedies. The Fifth Circuit determined that Texas's independent review provision was a law regulating insurance within the meaning of the saving clause. 215 F.3d at 538. The independent review law was nevertheless preempted, because it conflicted with the remedies of § 502 by creating an alternative procedure for obtaining benefits due under an ERISA plan. *Id.* at 539 (citations omitted).

The three-judge appellate panel that decided *Moran* conceded that its decision conflicted with the Fifth Circuit's decision in *Corporate Health* by circulating its opinion to the active members of the court pursuant to Rule 40(e).[7]

The Seventh Circuit voted against rehearing the case *en banc*.[8] The dissent agreed that "[t]he panel's decision creates a square conflict . . . " with the Fifth Circuit. 2000 U.S. App. LEXIS 26053 at *36.

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[7] "To the degree that our views differ from those of the Fifth Circuit, we find ourselves in respectful disagreement and therefore have circulated this opinion under Circuit Rule 40(e)." 2000 U.S. App. LEXIS 26053 at *35 n.7.

[8] Four judges voted for rehearing and joined the dissent drafted by Chief Judge Richard Posner. Circuit Judges Coffey, Easterbrook, and Wood joined the dissent.

Texas's and Illinois's independent review laws are very similar. They both provide for independent physician review of coverage determinations made by managed care organizations based on whether a covered service is medically necessary.[9] Accordingly, this Court should grant the Petition for a Writ of Certiorari in order to resolve the conflict.

**2. There is a conflict between the Fifth Circuit decision in *Corporate Health* and the Second Circuit decision in *Franklin Trust* as to whether the insurance saving clause can preserve from preemption a state law regulating insurance that provides a remedy.**

The Fifth Circuit in *Corporate Health* interpreted *Pilot Life* as requiring the preemption of a state independent review law that was otherwise "saved" as an insurance law within the meaning of ERISA § 514(b)(2)(A), because it conflicted with one of the causes of action available under ERISA § 502. The Fifth Circuit described a conflict with § 502 as including "not only directly conflicting remedial schemes, but also supplemental state law remedies." 215 F.3d at 539 (citations omitted). Notwithstanding *Pilot Life's* language invoking Congress's intent that ERISA's remedies be exclusive, the Second Circuit has held that laws regulating insurance within the meaning of the saving clause may provide remedies and enforcement mechanisms that supplement, without abrogating, the remedies available under § 502 of ERISA.

The Second Circuit in *Franklin Trust* determined that ERISA did not preempt enforcement of a New York law that regulated insurance within the meaning of ERISA

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[9] 215 Ill. Comp. Stat. 125/4-10 and Tex. Ins. Code art. 20A.12A; 21.58A § 6(c); 21.58A § 6A; 20A.09(e), and 21.58A § 6(b) (West 2000).

§ 514(b)(2)(A).[10] The Second Circuit explained that "[i]t would be quixotic to rule that a claim under a state statute that is saved from ERISA preemption . . . may nonetheless be enforced only via ERISA provisions and remedies." 50 F.3d at 151. This holding contradicts the Fifth Circuit's decision in *Corporate Health*. In *Corporate Health*, the Fifth Circuit determined that even though the independent review law regulated insurance within the meaning of § 514(b)(2)(A), it was preempted under ERISA § 502 because it provided "plan members" an alternative method for obtaining benefits under an ERISA plan. 215 F.3d at 539.

The Supreme Court should grant a writ of certiorari in order to resolve the conflict between the Fifth Circuit and the Second Circuit.

### B. *Corporate Health* Raises Compelling Issues of Great Public Importance.

#### 1. The resolution of conflicts regarding the validity of state independent review laws are of great public importance.

Independent review laws are critical to state consumer protection efforts because they address consumer concerns about the decisions made by managed care plans involving their health care.[11] Independent review

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[10] *Franklin Trust* involved a plaintiff's motion to remand after removal of a state law cause of action for damages based on the failure of Travelers Life Insurance Company to comply with N.Y. Ins. Law § 3214(c) (1999). This provision encourages timely claims payments by requiring that statutory interest on life insurance proceeds be computed from the date of death. The Second Circuit held that removal was improper because ERISA did not preempt the New York insurance law.

[11] "[External review programs] are meant to address concerns about managed care incentives that might lead to

laws were adopted in the states in the wake of decreased consumer confidence in the health care system and managed care in particular.[12] State independent review laws are intended to improve the quality of care provided by the plan, and consumers benefit from the knowledge that an independent, unbiased review of a health plan's decision is available.[13] It is an insurance regulator's primary responsibility to protect the interests of insurance consumers[14] and independent review is heralded as being "a fair, impartial and usually expeditious way to resolve disputes."[15]

Managed care requires cost containment, which creates tension between the provision of care on the one hand, and saving money on the other. *Pegram v. Herdrich*, 120 S.Ct. 2143, 2149 (2000). Independent review laws ameliorate policyholder concerns and impose a measure of accountability on managed care plans.[16]

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inappropriate denial of care, and to help restore public confidence in managed care." Karen Pollitz, Geraldine Dallek and Nicole Tapay, Institute for Health Care Research and Policy, Georgetown University, *External Review of Health Plan Decisions: An Overview of Key Program Features in the States and Medicare*, Nov. 1998, at 1, 7 [hereinafter *External Review of Health Plan Decisions*].

[12] *Managed Care Regulation and Oversight in Nine States*, Issue Brief, National Governor's Association Center for Best Practices, June 28, 2000, at 2-3.

[13] Geraldine Dallek and Karen Pollitz, Institute for Health Care Research and Policy, Georgetown University *External Review of Health Plan Decisions: An Update*, May 2000, at 1 [hereinafter *External Review Update*].

[14] NAIC, *A Tradition in Consumer Protection*, 1998, at 1.

[15] *External Review of Health Plan Decisions, supra* note 11, at 1.

[16] *See* The President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Quality*

To date, 38 states plus the District of Columbia have enacted independent review laws. The Kaiser Family Foundation updated its November 1998 study of independent review laws in May 2000 documenting a doubling in the number of such state laws.[17]

While there are some differences among the state approaches to external review laws, they all require an HMO to utilize an independent reviewer to resolve certain coverage disputes. Differences among the laws include the role of the state regulator in the independent review process,[18] and whether only insureds, or also their doctors, may request an independent review.[19]

Independent review systems typically evaluate and resolve at least those disputes involving medical issues.[20] Most states' independent review laws provide that the decision of the reviewer is binding on one or both of the parties.[21] Approximately half of the states that make the

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*First: Better Health Care for All Americans, Final Report to the President of the United States* (1998) (recommending that an independent review process be available to consumers). *See also External Review of Health Plan Decisions, supra* note 11.

[17] *External Review Update, supra* note 13.

[18] Sixteen states' independent review laws require that requests for independent review be filed with the insurance commissioner or another state agency. NAIC, *External Grievance Review Procedures*, Oct. 1, 2000, at 2-4 (*available in* www.naic.org/1whatsnew/) [hereinafter *NAIC Chart*].

[19] Seventeen states' independent review laws authorize a provider, under certain circumstances, to request independent review. *Id.* at 6-10. Three states authorize the insurer to request independent review. *Id.*

[20] *External Review of Health Plan Decisions, supra* note 11, at iii.

[21] Twenty-eight states' independent review laws specifically provide that the reviewer's decision is binding. *NAIC Chart, supra* note 18, at 73-76. Eleven of those states' laws

reviewer's decision binding, specifically provide that the decision is subject to judicial review.[22] Prohibition of conflicts of interest among the independent reviewer, the HMO and the case under review are also frequently included.[23] Another common provision requires that experts with clinical expertise in the area that is the subject of the dispute conduct the review.[24] Independent review laws are widely regarded as fair and useful in strengthening consumer confidence in managed care.[25]

The NAIC's Model Act provides that individuals may obtain independent review of certain adverse determinations made by an insurer or its agent. In general, the Model Act is typical of the kinds of independent review laws enacted in the states. In recognition of the variation in state external review laws, the Model Act includes three options. Each option differs in the degree to which the insurance regulator is involved in the independent review process.

It is important to preserve independent review laws regulating insurance company benefit decisions, because this Court's decision in *Firestone Rubber v. Bruch*, 489 U.S. 101 (1989), granted significant deference to insurance companies that deny claims by participants in ERISA plans. *Firestone* held that courts would presumptively

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specify that the reviewer's decision is binding with respect to both the insurer and the individual seeking review. *Id.* Five of those states' laws specify that the reviewer's decision is binding only on the insurer. *Id.* An additional six states do not explicitly state that they bind the insurer, but instead, require that the insurer comply with the independent reviewer's decision. *Id.*

[22] Thirteen states' independent review laws specifically mention that a reviewer's decision is subject to judicial review. *Id.*

[23] *Id.* at 49-56.

[24] *Id.* at 39-49.

[25] *External Review of Health Plan Decisions, supra* note 11.

review ERISA benefit determinations de novo, but that "a deferential standard of review [is] appropriate" when the decision maker is given "discretionary powers." *Id.*

This Court tempered its decision by noting that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.' " *Id.* at 115, (quoting Restatement (Second) of Trusts § 187, cmt. d (1959)). Since *Firestone* was decided in 1989, the circuits have struggled to apply this command to benefit decisions by insurance carriers who, by definition, labor under a structural conflict of interest. The Third Circuit in *Pinto v. Reliance Standard*, 214 F.3d 377, 382-393 (3rd Cir. 2000), has heroically reviewed the circuits' efforts and the resulting multiple circuit splits.

While more rigorous than many of its sister circuits, the Third Circuit concluded that it could "find no better method to reconcile *Firestone's* dual commands than to apply the arbitrary and capricious standard, and integrate conflicts as factors in applying that standard, approximately calibrating the intensity of our review to the intensity of the conflict." *Id.* at 393.

By passing independent review laws, state legislatures have expressed the judgment that insurers do not deserve deference when they are engaged in medical decision making to determine insurance coverage. Entrusted by ERISA with the regulation of insurance, the legislatures have determined that only a person free of conflicts should be permitted to make final decisions of such delicacy, discretion, and life or death importance.

The high percentages of reversals by state independent reviewers proves both the wisdom and importance of preserving these state laws from federal preemption.

The 1998 Kaiser Family Foundation Study compiled disposition statistics of state independent review laws.[26] The study found that independent reviewers reversed nearly as many health plan decisions as they upheld, overturning health plan decisions between 32 and 68 percent of the time.[27]

**2. State laws that regulate insurance and add an enforcement mechanism or other remedy to those provided by ERISA § 502 are an important part of the regulation of insurance reserved for the states in § 514(b)(2)(A).**

The Fifth Circuit held that Texas's independent review law provided a remedy to plan members seeking benefits, and that ERISA preempts all such supplemental state remedies, regardless of the application of the saving clause. This rationale directly threatens private parties seeking to enforce certain state insurance laws, and applied broadly, may even call into question the enforcement authority of state insurance regulators.

State laws that provide remedies are a critical part of the regulation of insurance. Without enforcement provisions, such laws would be ineffective. Yet, this is the consequence of the Fifth Circuit's decision.

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[26] The following is a list of states, their effective dates and the percentage of cases that were decided in favor of the consumer. Connecticut – January 1998 – 66%; Florida – 1985 – 60%; Michigan – 1978 – 39%; Missouri – 1994 – 50%; New Jersey – 1997 – 42%; New Mexico – March 1997 – 50%; Pennsylvania – 1991 – 37%; Rhode Island – 1997 – 68%; Texas – November 1997 – 48%; Vermont mental health law – November 1996 – 33%. *External Review of Health Plan Decisions, supra* note 11, at vii-viii.

[27] *Id.* at iv.

Several states provide insureds with causes of action for unfair claims payment practices.[28] ERISA explicitly recognizes the states' continuing ability to regulate insurance. But insurance regulation is significantly impaired if ERISA is construed to preempt state provisions for private remedies and methods of enforcing that law. *See Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988) (relying on the purportedly exclusive nature of § 502's remedies to invalidate a law of this type).

We do not believe the Fifth Circuit's rationale goes so far as to preclude state insurance regulator actions to enforce laws such as those governing unfair claim practices. However, some Courts might erroneously fail to distinguish state insurance regulator enforcement actions that result in orders to pay claims, as well as penalties.

### C. The Fifth Circuit Decision is Incorrect; Independent Review Laws do not Provide Remedies that Conflict with § 502, and Even if They are Remedies, They are Subject to the Saving Clause.

#### 1. *Pilot Life* did not take into account the presumption against preemption, which has informed this Court's recent preemption opinions.

This Court's recent ERISA preemption cases emphasize Congress's intent to reserve to the states those laws

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[28] Mich. Comp. Laws § 500.2006 (2000) (private right of action for certain delayed claims payments); N.M. Stat. Ann. § 50A-16-30; § 50A-16-20 and § 50A-16-21 (2000) (private right of action for insurer's failure to pay claims in a timely manner); Wyo. Stat. § 26-15-124 (2000) (private right of action against insurer based on wrongful refusal to provide benefits). Ala. Code § 27-12-24 (2000) and 42 Pa. Cons. Stat. Ann. § 8371 (1999) (tort of insurer bad faith).

that are part of their historic police powers. The United States observed in its Brief as Amicus Curiae, LEXIS 1997 U.S. Briefs 1868 at *24, *UNUM* (No. 97-1868), that this Court's recent recognition of this presumption against preemption reinforces the force of the plain meaning of ERISA's saving clause (citing *New York Conference of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *see also De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n. 8 (1997), *California Div. of Labor Standards Enforcement v. Dillingham Construction N.A.*, 519 U.S. 316, 325 (1997)). In light of the post-*Pilot Life* recognition of the importance of preserving state law, this Court should revisit the issue of whether state laws that regulate insurance are preempted, merely because they provide a remedy.

**2. State independent review laws do not add alternative enforcement mechanisms to ERISA.**

Both the Fifth Circuit in *Corporate Health* and the Seventh Circuit in *Moran* recognized that the independent review laws at issue regulated insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A). The court in *Moran*, however, reasoned that Illinois's independent review law was not an alternative enforcement provision that conflicted with ERISA § 502. The court stated that the "independent review scheme . . . is not tantamount to the relief offered under ERISA § 502(a)(1)(B)." 2000 U.S. App. LEXIS 26053 at *31. The independent review law becomes a substantive term in all insurance policies. Therefore, an action to enforce the decision of an independent reviewer can be brought under § 502 as an action to enforce the terms of the plan. *Id.*[29]

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[29] The dissent from denial of rehearing en banc in *Moran* suggested that two issues were unresolved. First, Illinois's independent review law undermines "the statutory purpose of

Indeed, Texas's independent review law is indistinguishable from other state laws that are not preempted; it regulates insurance and is enforceable by a participant in a suit under 502(a)(1)(B) to recover benefits. Such laws include mandated benefits laws, which add covered benefits to the terms of an insured ERISA plan (*Metropolitan Life*), as well as laws that change the terms of an insured plan by adding procedural protections to assure that covered benefits promised by the insurer are actually delivered (*UNUM*). Unquestionably then, a state law may alter an insurer's claims procedure to the point of changing the outcome of a claim, without running afoul of preemption.

Similarly, there would be no basis for challenging other state laws aimed at insurance carriers that adjust the method by which carriers decide claims. The law at issue here is no different. The state is merely prescribing the qualifications of the person who has the authority to decide a type of claim. As in *UNUM*, where a participant could only enforce the notice-prejudice rule through a suit pursuant to Section 502(a)(1)(B) of ERISA, the

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federal uniformity in the administration of ERISA plans." *Moran* at *39. This Court rejected this argument in *Metropolitan Life Ins. Co. v. Massachusetts* by recognizing that "disuniformities are the inevitable result of the congressional decision to 'save' local insurance regulation." 471 U.S. 724, 747 (1985).

Second, Illinois's independent review law could not both regulate insurance and become a part of the ERISA plan enforceable in federal court. *Moran* at *41. The dissent misunderstands the relationship between laws that regulate insurance and ERISA. *See FMC Corp. v. Holliday*, 498 U.S. 52, 64 (1990); *UNUM*, 526 U.S. 358, 375; and *Pegram*, 120 S.Ct. at 2151.

determination of the state approved decision maker here, can only be enforced through ERISA.[30]

### 3. The saving clause § 514(b)(2)(A) should be read as limiting the preemptive effect of § 502.

*Pilot Life's* observation that laws regulating insurance cannot supplement the remedies provided by § 502 of ERISA was dicta. 481 U.S. at 54. *Pilot Life* did not involve a law which regulated insurance. *Id.* at 51. Thus, it was not necessary for this Court in *Pilot Life* to say that Congress intended that all remedies that relate to ERISA plans, regardless of whether or not they regulate insurance, are to be the exclusive vehicle for beneficiary recovery.[31] *Id.* at 52. Accordingly, the language in *Pilot Life* regarding Congress's intent for ERISA's remedies to be exclusive should be limited to state laws that relate to an ERISA plan, but are outside the scope of the saving clause. *See* Brief for the United States as Amicus Curiae at LEXIS 1997 U.S. Briefs 1868 *22-*24, *UNUM* (No. 97-1868).[32]

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[30] *See* Brief of the Secretary of Labor as Amicus Curiae at 18, *Moran* (No. 99-2574) (*available in* www.dol.gov/pwba/public/pubs/ab/moranfin.txt).

[31] *See Franklin Trust; Hill v. Blue Cross Blue Shield of Alabama*, No. 00-AR-1590-S, 2000 U.S. Dist. LEXIS 15132 (N.D. Ala. Oct 10, 2000); *Selby v. Principal Mutual Life Ins. Co.*, No. 98 Civ. 5283, 2000 U.S. Dist. LEXIS 1495 (S.D. N.Y. Feb. 16, 2000); *Lewis v. Aetna U.S. Healthcare*, 78 F. Supp. 2d 1202 (W.D. Okla. 1999).

[32] *But see Kanne*, 867 F.2d 489, *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194-1195 (8th Cir. 1988).

**a. Under the plain language of ERISA, the insurance saving clause applies to all provisions of title I of ERISA, including § 502.**

ERISA's express preemption provision, § 514, explains the relationship between ERISA and other laws. Section 514(a) states that, "[e]xcept as provided in subsection (b) of this section, the provisions of this title [title I] and title IV shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." This Court has often described the "expansive sweep" of this provision. *Pilot Life*, 481 U.S. at 47 (citations omitted).

Congress, however, included § 514(b)(2)(A), the saving clause, as an exception to the otherwise sweeping federal preemption in § 514(a). ERISA § 514(b)(2)(A) states that "[e]xcept as provided in subparagraph (B),[33] nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance."[34]

Based on the language of the statute, the interaction of these two sections explains that ERISA preempts state laws that relate to ERISA plans, unless they regulate insurance. This Court supported this interpretation in *Metropolitan Life*, 471 U.S. at 733, 735, and in *Pilot Life* before the issue of § 502 is discussed. 481 U.S. at 47.

By the plain language of the statute, ERISA § 502 is subject to the saving clause. The saving clause provides that nothing in title I, which includes § 502, shall be construed to exempt or relieve any person from "any

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[33] Referencing the deemer clause, which provides that a state cannot deem an ERISA plan an insurer for the purpose of regulating it. The deemer clause is not at issue in this case.

[34] Laws that regulate banking and securities are also exempted from the preemptive scope of § 514(a).

law" of any state. Thus, the Fifth Circuit's decision in *Corporate Health* is inconsistent with the statute.

The Fifth Circuit determined that Texas's independent review law supplemented ERISA's remedies under § 502, and was therefore preempted regardless of the saving clause. This holding fails to recognize that § 502 is specifically subject to the saving clause because "any law" is saved, not as the Fifth Circuit would have it, "any law except a law that provides a remedy."

If Congress intended to save all laws that regulate insurance from preemption, except those that provide remedies, it would have said so in § 514(b)(2)(A). Section 514(a) already includes one exception, subsection (B), for laws that deem ERISA plans to be insurers. Surely, Congress would have included another exception, if it meant to provide one.

This Court in *Pilot Life* states that the comprehensive nature of the language and structure of § 502 "provide[s] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 481 U.S. at 54 citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Applying this statement to all state laws, including those that regulate insurance within the meaning of § 514(b)(2)(A), unjustifiably discounts the language and structure of the entire ERISA statute, and the saving clause in particular. This Court should hold that § 502 provides the exclusive remedy only where a state law that relates to an ERISA plan is not within § 514's saving clause.[35] The Court should not resort to legislative history where the words of the statute are plain. *See Harris Trust and Saving Bank v. Salomon Smith Barney Inc.*, 120 S.Ct. 2180, 2190 (2000) (citations omitted). As explained below, the legislative

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[35] *See UNUM*, 526 U.S. at 376 (acknowledging without deciding Government's argument to same effect).

history of § 502 is an unreliable guide to the proper interpretation of the saving clause.

**b. The legislative history of ERISA is misleading, because the analogy to § 301 of LMRA is flawed.**

In *Pilot Life*, this Court reasoned that, based on the legislative history of ERISA,[36] Congress intended to federalize ERISA remedies under § 502 the same way that § 301 of LMRA had federalized remedies for violation of collective bargaining agreements. 481 U.S. at 55. Consequently, according to this Court in *Pilot Life*, the federal remedies available under § 502 displace state causes of action. *Id.* at 56.

This Court should reconsider this conclusion. There are obvious and fundamental differences between LMRA and ERISA. In contrast to ERISA, LMRA is an entirely federal law that occupies the field of employer-employee contractual relationships and does not contain a saving clause.

ERISA, with the inclusion of the saving clause, clearly contemplates that both state and federal laws apply to insured ERISA plans. *See Metropolitan Life*, 471 U.S. at 727-747; *UNUM*, 526 U.S. at 375-377. Therefore, Congress's intent to pattern § 502 after § 301 of LMRA does not inform the treatment of a state cause of action that regulates insurance within the meaning of the saving clause. Brief for the United States as Amicus Curiae,

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[36] This Court references the remarks of Senator Javits and H.R. Rep. No. 93-533 at 12 (1973) *reprinted in* 2 Senate Committee on Labor and Public Welfare, Legislative History of ERISA, 94th Cong., 2d Sess., 2359 (Comm. Print 1976). 481 U.S. at 56.

LEXIS 1997 U.S. Briefs 1868 at *25, *UNUM* (No. 97-1868); *see also* Brief of the Secretary of Labor as Amicus Curiae at 19-20, *Moran* (No. 99-2574). Accordingly, this Court should not read ERISA's legislative history as limiting the saving clause.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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